

10-2013

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Siyuan CHEN

Singapore Management University, siyuanchen@smu.edu.sg

DOI: <https://doi.org/10.1350/ijep.2013.17.4.437>

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Citation

CHEN, Siyuan. Is the Invocation of Inherent Jurisdiction the Same as the Exercise of Inherent Powers? Re Nalpon Zero Geraldo Mario [Case Note]. (2013). *International Journal of Evidence and Proof*. 17, (4), 367-374. Research Collection School Of Law.

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Case Note

Is the invocation of inherent jurisdiction the same as the exercise of inherent powers?: *Re Nalpon Zero Geraldo Mario*

By Chen Siyuan*

Assistant Professor of Law, Singapore Management University

Keywords Inherent jurisdiction of a court; Inherent powers of a court; Judicial discretion; Singapore

In *Re McC (A Minor)*, Lord Bridge of Harwich remarked that few words have been ‘used with so many different shades of meaning in different contexts’ and ‘have so freely acquired new meanings’ as the word ‘jurisdiction’.¹ The definitional conundrum deepens when ‘jurisdiction’ is combined with the adjective ‘inherent’, yet common law courts around the world routinely claim to invoke inherent jurisdiction for a wide array of purposes in civil and criminal matters, ranging from the reception of evidence to the ensuring of a fair trial, and this necessarily raises questions about the limits of such an exercise.²

* Email: siyuanchen@smu.edu.sg.

1 [1985] 1 AC 528 at 536.

2 See, e.g., R. Joseph, ‘Inherent Jurisdiction and Inherent Powers in New Zealand’ (2005) 11 *Canterbury Law Review* 220; J. Donnelly, ‘Inherent Jurisdiction and Inherent Powers of the Irish Courts’ (2009) 2 *Judicial Studies Institute Journal* 122; W. H. Charles, ‘Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic’ (2010) 33 *Dalhousie LJ* 63; Goh Y. H., ‘The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise’ [2011] *Singapore Journal of Legal Studies* 178; J. Liang, ‘Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of their Application’ (2012) 15 *New Criminal Law Review* 375.

To add another twist, the Singapore Court of Appeal has now effectively proclaimed in *Re Nalpon Zero Geraldo Mario*³ that the term ‘inherent jurisdiction’ is actually a misnomer, in that it has little to do with jurisdiction properly understood; any invocation of inherent jurisdiction should be more accurately described as nothing more than an exercise of a court’s inherent powers.⁴ This case note questions if this is necessarily true.

Facts and decision in *Re Nalpon Zero Geraldo Mario*

The appellant’s client was convicted of criminal breach of trust.⁵ The appellant filed a motion, alleging that the Deputy Public Prosecutor had withheld important evidence from the court to mislead it. This was dismissed,⁶ but the appellant filed another application for leave for an investigation to be made against the Deputy Public Prosecutor, citing s. 82A⁷ of the Legal Profession Act (LPA).⁸ The Chief Justice heard the application and dismissed it on the basis that no *prima facie* case was established.⁹ The appellant then appealed to the Court of Appeal (the apex court in Singapore).

As it was unclear as to the capacity in which the Chief Justice had heard the application, there was an issue of whether the Court of Appeal even had jurisdiction to hear the appeal. After receiving submissions, the Court of Appeal held that it had no jurisdiction. It pointed to s. 29A(1)¹⁰ and (2)¹¹ of the Supreme Court of Judicature Act (SCJA),¹² which essentially states that the Court of Appeal is conferred jurisdiction to hear appeals made from the High Court exercising its original or appellate civil jurisdiction or original criminal jurisdiction. In this regard, the

3 [2013] SGCA 28.

4 Ibid. at [33]–[41].

5 DAC Nos. 18210 and 18211 of 2009.

6 MA 401/2010; *Ezmiwardi bin Kanan v Public Prosecutor* [2012] SGHC 44.

7 The title of the section is ‘Disciplinary proceedings against Legal Service Officers and non-practising solicitors’.

8 Chapter 161, Revised Edition 2009.

9 OS 77/2012.

10 The subsection states: ‘The civil jurisdiction of the Court of Appeal shall consist of appeals from any judgment or order of the High Court in any civil cause or matter whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.’

11 The subsection states: ‘The criminal jurisdiction of the Court of Appeal shall consist of appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.’

12 Chapter 322, Revised Edition 2007.

Court of Appeal identified at least three factors that militated against the finding of jurisdiction.

First, the Chief Justice had not heard the application qua High Court Judge but qua President of the Legal Service Commission, the body which (by virtue of art. 111(3)¹³ of the Constitution of the Republic of Singapore)¹⁴ can exercise disciplinary control over all Legal Service Officers (such as Deputy Public Prosecutors); accordingly, the Chief Justice was not making a judicial decision that was appealable under the SCJA.¹⁵ Secondly, the Chief Justice was exercising neither civil nor criminal jurisdiction but disciplinary jurisdiction, a peculiar form of jurisdiction that was outside the purview of the SCJA.¹⁶ Thirdly, in any event, s. 82A of the LPA does not provide for any right of appeal, and a perusal of the legislative records revealed that Parliament had wanted a simpler disciplinary process (as compared to lawyers in private practice) for Legal Service Officers.¹⁷

Up to this point, the Court of Appeal's judgment is probably uncontroversial, as it relied on a long line of cases (both local and from various other common law jurisdictions) that held that as a court is a creature of statute, its jurisdiction, broadly conceived, is created and circumscribed by statute.¹⁸ The Court of Appeal also relied on a long line of cases that held that there is an established category of jurisdiction known as disciplinary jurisdiction; further, the legislative records confirmed that Parliament intended the disciplinary jurisdiction to be vested in specially constituted tribunals, and not the High Court or Court of Appeal.¹⁹

However, the Court of Appeal went on to reject the notion that it could nevertheless rely on any residual or inherent jurisdiction to hear the appeal. To be clear, this conclusion is probably correct on the facts of the case, but in reasoning to this conclusion the Court of Appeal claimed that a court's jurisdiction is completely limited to what is derived from the relevant legislation; the term 'inherent jurisdiction' is effectively a misnomer and does not refer to or arise from any notion of residual jurisdiction, and any invocation of 'inherent jurisdiction' should instead be understood as a court's exercise of inherent or residual powers.²⁰

13 The article states that 'it shall be the duty of the Legal Service Commission to appoint, confirm, emplace on the permanent establishment, promote, transfer, dismiss and exercise disciplinary control over officers in the Singapore Legal Service'.

14 Revised Edition 1985, Reprint 1999.

15 *Re Nalpon Zero Geraldo Mario* [2013] SGCA 28 at [64]–[65].

16 *Ibid.* at [67]–[70].

17 *Ibid.* at [64]–[65].

18 *Ibid.* at [14]–[20].

19 *Ibid.* at [49]–[60].

20 *Ibid.* at [27]–[42].

Analysis of *Re Nalpon Zero Geraldo Mario*

The Court of Appeal reached this conclusion despite initially drawing a difference between ‘jurisdiction’ and ‘power’, two terms that it noted are often used interchangeably by courts. Citing the *Oxford English Dictionary* and the Singapore High Court case of *Muhd Munir v Noor Hidah*,²¹ the Court of Appeal began its analysis by defining ‘jurisdiction’ to mean the court’s ‘authority, however derived, to hear and determine a dispute that is brought before it’.²² It then distinguished ‘jurisdiction’ from ‘power’, which it opined refers to a court’s prerogative to issue orders, compel parties, stay proceedings, and so forth.²³ So why then did it proceed to equate inherent jurisdiction with the exercise of a court’s inherent powers? In the main, it characterised three instances in the past of courts purportedly invoking their inherent jurisdiction as mere exercises of their residual powers from jurisdiction conferred by statutes (such as the SCJA).

The first case was *MCST Plan No. 301 v Lee Tat Development Pte Ltd*,²⁴ where the court had invoked its inherent jurisdiction to reopen and rehear an issue it had decided in breach of natural justice. However, the Court of Appeal characterised this re-examination as a mere continuation of earlier proceedings.²⁵ The second case was *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*,²⁶ where the court had invoked its inherent jurisdiction to strike out paragraphs of a petition despite not being empowered by the Rules of the Supreme Court 1970 to do so. However, the Court of Appeal characterised this as just an exercise of its power to control its own civil process.²⁷ The third case was *UCMI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd*,²⁸ where the court held that even if it was not empowered by the Rules of Court²⁹ to compel the production of certain documents, it could nevertheless rely on its inherent jurisdiction to make such an order. However, the Court of Appeal similarly characterised this as just an inherent prerogative to ensure procedural justice.³⁰

To be sure, the Court of Appeal does not seem to be alone in disambiguating the invocation of inherent jurisdiction to mean nothing more than an exercise of

21 [1990] 2 SLR(R) 348 at [19].

22 *Re Nalpon Zero Geraldo Mario* [2013] SGCA 28 at [12]–[13], [30]–[31].

23 *Ibid.* at [32].

24 [2011] 1 SLR 998.

25 *Re Nalpon Zero Geraldo Mario* [2013] SGCA 28 at [36].

26 [1991] 1 SLR(R) 728.

27 *Re Nalpon Zero Geraldo Mario* [2013] SGCA 28 at [37].

28 [2006] 4 SLR(R) 95.

29 Chapter 322, r. 5, Revised Edition 2006.

30 *Re Nalpon Zero Geraldo Mario* [2013] SGCA 28 at [38]–[39].

inherent powers. Professor Pinsler, a leading academic in Singapore on evidence and the civil and criminal process, has written a number of articles that appear to have made the same point.³¹ There are also a number of other Singapore cases that appear to have equated the invocation of inherent jurisdiction with an exercise of inherent powers.³² Indeed, when the 2012 amendments to the Evidence Act's³³ provisions on hearsay and expert evidence were debated in Parliament (the issue was whether judges have the discretion to exclude relevant but prejudicial evidence),³⁴ the Minister for Law did not appear to distinguish between inherent jurisdiction and inherent powers either.³⁵

Yet the most fundamental question remains unanswered: what is the source or basis of inherent powers? Underpinning the Court of Appeal's conception of inherent powers is that they are completely parasitical upon and contingent on the court's statutorily conferred jurisdiction.³⁶ On an opposite (and rather mainstream) view, however, it has been proposed that inherent powers actually 'arise from the status and role of the court itself, rather than from an external vesting source such as statutory law'.³⁷ Putting aside the Court of Appeal's claim that inherent jurisdiction and inherent powers are interchangeable for the

31 J. Pinsler, 'The Inherent Powers of the Court' [1997] *Singapore Journal of Legal Studies* 1; J. Pinsler, 'Inherent Jurisdiction Re-visited' (2002) 14 *Singapore Academy of Law Journal* 1; J. Pinsler, 'Whether a Singapore Court has a Discretion to Exclude Evidence Admissible in Criminal Proceedings' (2010) 22 *Singapore Academy of Law Journal* 335.

32 See, e.g., *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [29]–[30]; *Attorney-General v Tee Kok Boon* [2008] 2 SLR(R) 412 at [123]–[131]; *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [52] and [112]; *Then Khek Khooon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [13]–[14]. See also *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [81]; *Muhammad bin Kadar v Public Prosecutor* [2011] 4 SLR 791 at [5]–[6]; *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] SGCA 33 at [23].

33 Chapter 97, Revised Edition 1997.

34 In this regard see Chen S. Y., 'The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction' (2012) 16 E&P 398; Chen S. Y., 'The 2012 Amendments to Singapore's Evidence Act: More Questions than Answers as Regards Expert Opinion Evidence?' (2013) 34 *Statute Law Review* 3.

35 Second Reading of Evidence (Amendment) Bill, *Singapore Parliament Reports*, 14 February 2012.

36 See also Chen S. Y., 'Jurisdiction, Power, Inherent Jurisdiction, and Inherent Power' (4/2013) *Singapore Law Watch Commentaries* 1 at 4: 'the Court of Appeal had mentioned that in this particular attempted appeal, there were no circumstances to justify the exercise of its inherent powers (thus suggesting that it was theoretically possible to have had recourse to its inherent powers to hear such an appeal). This is a potential self-contradiction because as it had postulated, the permissibility of hearing an appeal depends entirely on jurisdiction, not power. Without jurisdiction, it could not have exercised any power, inherent or otherwise, to grant the appeal, since either power is contingent on the existence of jurisdiction to begin with.'

37 Goh Y. H., 'The Jurisdiction to Reopen Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal' [2008] 2 *Singapore Journal of Legal Studies* 395 at 406.

moment, by many conceptualisations, the inherent powers of a court, be it in the civil or criminal context, exist independently of what has been statutorily conferred and by definition will subsist even if a statute attempts to curtail or oust such powers.³⁸ It is also not uncommon for inherent powers to be described as very open-ended, capable of being invoked in any situation.³⁹

In this connection, perhaps the Court of Appeal could have presented its conclusion in a different way. When courts seek to exercise their inherent powers—for instance, to cure any procedural defects or to prevent an abuse of process of court—it will be a mis-description to say that they are exercising their inherent jurisdiction. Rather, they are exercising inherent powers in the sense that these powers exist regardless of whether the relevant statute has provided for them;⁴⁰ inherent powers exist by virtue of the court's nature and function to ensure justice in each case.⁴¹ This will also satisfactorily explain and reconcile the cases (sans *MCST Plan No. 301*, which we will revisit shortly) cited by the Court of Appeal, in that in those cases, the courts were simply exercising powers that were not expressly provided for in the respective statutes. Taking this view will obviate any need to go one step further (as the Court of Appeal did) and collapse inherent jurisdiction and inherent powers into one. The question that still remains, however, is: what then does 'inherent jurisdiction' mean, if it is not the same as inherent powers?

38 See, e.g., J. A. Jolowicz, 'Practice Directions and the Civil Procedure Rules' (2000) *Camb LJ* 53 at 56–7; M. Arden, 'Prospective Overruling' (2004) 120 *Law Quarterly Review* 7 at 10; J. Sorabji, 'Protection from Litigants who Abuse Court Process' (2005) 24 *Civil Justice Quarterly* 31 at 32; P. Cane, 'Judicial Review in the Age of Tribunals' (2009) *Public Law* 479 at 499; R. W. L. Assy, 'The Power to Reconsider Orders under CPR 3.1(7)' (2010) 29 *Civil Justice Quarterly* 175 at 175; A. Brammer and P. Copper, 'Still Waiting for a Meeting of Minds: Child Witnesses in the Criminal and Family Justice Systems' [2011] *Crim LR* 925 at 926.

39 See, e.g., A. Zuckerman, 'Must a Fraudulent Litigant Be Allowed to Think: If the Fraud Is Successful, I Will Gain Much; If It Is Not, I Will Still Recover My Legitimate Claim' (2011) 30 *Civil Justice Quarterly* 1 at 11. This means that inherent powers can encompass positive and negative acts—an instance of the former being a court's power to rehear a dispute, and an instance of the latter being a court preventing a piece of (relevant) evidence from being part of the evidentiary record.

40 See also *Ramachandran a/l Suppiah v Public Prosecutor* [1992] 2 SLR(R) 571, where the Court of Appeal proceeded to hear a motion to rehear an appeal and set aside its previous judgment even though the SCJA did not expressly give the court the power to do so (nor did it expressly deny the court the power to do so).

41 See also Chen, 'The 2012 Amendments to Singapore's Evidence Act: More Questions than Answers as Regards Expert Opinion Evidence?', above n. 36 at 4: 'apart from constitutional constraint, the inherent jurisdiction of a court, which exists independently of statutory conferral ... is (short of a revolution) what allows the judicial branch of government to subsist meaningfully when the other branches of government turn rogue and attempt, for instance, to heavily curtail or even eliminate ... the jurisdiction (and concomitantly, powers) of the courts'.

To answer that, it is necessary to return to the Court of Appeal's preferred definition of 'jurisdiction', which is the authority of a court to hear a dispute. 'Inherent jurisdiction' will therefore refer to a court's inherent authority to hear a dispute, in addition to what has been statutorily conferred. Naturally, in the interest of certainty, questions will be raised about the scope of such a jurisdiction. For one, it is accepted that anything that is claimed to be 'inherent' can only be justifiably invoked in exceptional circumstances—as is already the case for a court's exercise of inherent powers.⁴² For another, a couple of (perhaps tentative) suggestions as to how to circumscribe and limit the scope of a court's inherent jurisdiction can indeed be made, bearing in mind that 'jurisdiction' refers to the authority to hear a dispute.

The first, as proposed by Professor Goh in the context of a court's inherent authority to reopen and rehear a dispute, is based on a test of necessity in the sense that it must clearly be established that a significant injustice had probably occurred and that there are no alternative effective remedies.⁴³ This paradigm is also consistent with *MCST Plan No. 301*, since a (substantial) breach of the rules of natural justice would qualify as 'a significant injustice' and there was nothing in that case to suggest that alternative remedies existed. Another suggestion, perhaps more apt in the context of a court's inherent authority to hear an appeal, will be to ask if any decision that disposes of a party's substantive rights has been unfairly curtailed (by statute) in terms of appellate recourse. This test may be extrapolated from two recent decisions by the Court of Appeal, *OpenNet Pte Ltd v IDA of Singapore*⁴⁴ and *Dorsey James Michael v World Sport Group Pte Ltd*.⁴⁵ Amendments to the SCJA in 2010 had streamlined the appellate process for interlocutory applications by statutorily listing the orders that were non-appealable and appealable only with leave. However, it was unclear if orders made at applications that did not fall into these two categories would necessarily be appealable as of right. In answering this question, the Court of Appeal decided that where the SCJA is silent, its appellate jurisdiction would depend on the legislature's reasons for the amendment, as well as the impact on a party's substantive rights if jurisdiction was denied. Having said this, the better recourse for the appellant in *Re Nalpon Zero Geraldo Mario* may have been judicial review, since (as the Court of Appeal rightly decided) the Chief Justice was not making a judicial decision to begin with.

42 *Re Nalpon Zero Geraldo Mario* [2013] SGCA 28 at [42].

43 Goh, above n. 37 at 418.

44 [2013] SGCA 24 at [29].

45 [2013] SGCA 31 at [82].